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6 UNITED STATES DISTRICT COURT  
7 NORTHERN DISTRICT OF CALIFORNIA  
8

9 ANITA B. CARR,

No. C 05-03190 TEH

10 Plaintiff,

Date: February 9, 2009  
Time: 10:00 a.m.

11 vs.

12 LIBERTY LIFE ASSURANCE  
COMPANY, et al.,

13 Defendant.  
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18 **REPLY IN SUPPORT OF MOTION TO AMEND**  
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1           Although Liberty Mutual filed reams of paper briefing the issue before the Court,  
2 almost none of it is relevant. Clearly, this case went to “binding” arbitration, based upon the  
3 arbitration clause in the employment agreement, which extended to cover this ERISA benefits claim.  
4 Just as clearly, the Department of Labor, prior to the 2001 amendments to 29 CFR 2560.503,  
5 prohibited binding arbitration of ERISA benefit claims, except for collectively bargained  
6 agreements. The 2001 amendments *expanded* the use of arbitration, but defined “binding”  
7 arbitration as simply another level of appeal. Accordingly, if the employee prevails, this is,  
8 effectively, the Plan’s decision to pay the benefits. But if the Plan prevails, the regulation plainly  
9 allows the employee to challenge the decision in Court. In the present case, there were two claims  
10 made by Ms. Carr to the Plan – one before the 2001 amendments became effective, and one after.  
11 Accordingly, the Plan properly demanded binding arbitration, and the Court ordered it. We  
12 discussed this in more detail in Docket 77, our opposition to Liberty’s motion to confirm the  
13 arbitration award, and will not repeat that discussion here.

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15           Liberty Mutual makes a number of arguments which are simply not on point. Ms.  
16 Carr is not moving to modify or vacate the award, and so the 90 day limit to do that under the  
17 Federal Arbitration Act is of no moment. Rather, she accepts the award as the exhaustion of her  
18 administrative remedies under ERISA, and now desires to proceed in Court, just as she would if her  
19 administrative appeal had been denied by the Plan Administrator.

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21           Liberty Mutual contends that Ms. Carr released her claim by accepting a severance  
22 package. This argument is premature, but Liberty is entitled to make it when this Court reaches the  
23 merits of Ms. Carr’s case. We believe the Court will determine that compelling a disabled employee  
24 to forego their ERISA protected disability benefits in order to obtain their ERISA protected  
25 severance benefits constitutes an illegal discrimination against disabled employees, and accordingly,  
26 we do not understand that release to prohibit this action. See *Lessard v. Applied Risk Management*,  
27 307 Fed. 3d 1020 (9<sup>th</sup> Cir. 2002). But, in any event, that argument will wait for a more appropriate

1 time.

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3 The Department of Labor regulations limit the use of binding arbitration for ERISA  
4 benefit claims. Those regulations set the public policy of the United States of America, and must be  
5 enforced.

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7 The Court should grant the motion to amend.

8  
9 January 26, 2009

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11 /s/\_\_\_\_\_  
12 Laurence F. Padway  
13 Attorney for Anita Carr  
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28 Reply Mot. Amend.